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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 139

DIAMOND KIMM, *Petitioner*

v.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (R. 80-94) is reported at 263 F. 2d 773. The findings of fact and conclusions of law of the district court (R. 8-12) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1959, and a petition for rehearing was denied on March 30, 1959 (R. 95). The petition for a

writ of certiorari was filed on June 24, 1959, and was granted on October 12, 1959 (R. 96; 361 U.S. 807). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on application for suspension of deportation, an alien's refusal on the ground of self-incrimination to answer the question whether he is or has been a member of the Communist Party justifies denial of suspension on the ground that suspension is not available to Communists under the statute and the alien's refusal to answer withholds information necessary for consideration of his application.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of Section 19 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended; the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended, and 8 C.F.R. (1949 ed.) 151.3(e), as amended, are set forth in the Appendix, *infra*, pp. 26-28.

STATEMENT

The petitioner, a native and citizen of Korea, now 58 years of age, was admitted to the United States on July 6, 1928, at the age of 26, as a student under Section 4(e) of the Immigration Act of 1924[1] (R. 67-68, 75). Except for a visit of a few hours to Mexico in July, 1935, he has been in this country continuously ever since (R. 68, 75). His wife, also a citizen of

[1] 43 Stat. 155, 8 U.S.C. (1946 ed.) 204(e). This section authorized the admission into the United States, as non-quota immigrants, of foreign students seeking admission solely for the purpose of pursuing courses of study at accredited schools and colleges.

Korea, entered this country as a temporary visitor in the same month in which petitioner arrived (R. 25-26, 70). She was accompanied by an infant son, likewise a native and citizen of Korea (R. 26, 70). In 1934, petitioner's wife and child returned to Korea and have not been in this country since (R. 26, 70, 76). They were living in Korea at the time of the Board of Immigration Appeals' decision in this case (1952), and, so far as appears, they still reside there (*ibid.*). The petitioner has neither relatives nor anyone dependent upon him for support in the United States (R. 72, 76).

In 1937, the petitioner planned to return to Korea and rejoin his family, but the outbreak of hostilities between Japan and China in that year made him unwilling to do so (R. 38). In 1938, he abandoned his status as a student and sought and accepted full-time employment (R. 38, 68, 75-76).

In December, 1941, deportation proceedings were commenced against the petitioner on the charge that he had failed to maintain the exempt status of a student under which he was admitted (R. 13, 19-20), and, following a hearing, he was found to be deportable on this ground (R. 14, 56). During the proceedings the petitioner applied for the privilege of departing from the United States at his own expense in lieu of deportation (R. 17-18). This request, on the recommendation of the presiding inspector (R. 15-16), was, on April 17, 1943, granted by the Board of Immigration Appeals (R. 56). The Board's order directed that the petitioner depart from the United States without expense to the government to any country of his choice "within 90 days following the issuance to him of an exit permit, or within 90 days following the date on

which exit permits cease to be required in such cases, whichever shall come sooner" (*ibid.*).

Since exit permits were required during World War II, the petitioner was under no immediate duty to depart. Apparent attempts by the petitioner to obtain an exit permit in 1945 and again in 1947[2] (exit permits did not cease to be required until October 1948; see R. 79) were unsuccessful.

On July 1, 1948, the petitioner, who, as a Korean, had previously been ineligible for the privilege of suspension of deportation, became eligible to apply for that form of relief by an amendment of the pertinent provisions of Section 19(c) of the Immigration Act of February 5, 1917 (as previously amended).[3] On April 6, 1949, the petitioner's case was administratively ordered reopened to permit him to apply for the benefits provided for by the 1948 amendment (R. 53-54). Before further action in the reopened case was taken,

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[2] See R. 38-40, 42-43, 58-59; but see R. 77.

[3] Prior to the amendment of July 1, 1948 (62 Stat. 1206), deportable persons were ineligible for suspension of deportation if they were "racially inadmissible or ineligible to naturalization" (§ 19(c), as amended by the Act of June 28, 1940, Section 20, 54 Stat. 671, 672, 8 U.S.C. (1946 ed.) 155(c)). In addition, suspension required a finding by the Attorney General that deportation would cause "serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien" (*ibid.*). The Act of July 1, 1948 (62 Stat. 1206) amended Section 19(c) so as (1) to broaden the class of persons eligible for suspension to include those persons, ineligible for naturalization, whose ineligibility was (as in petitioner's case) "solely by reason of [their] race" (see 8 U.S.C. (1946 ed., Supp. II) 155(c)) and (2) to permit suspension where there was a finding (as an alternative to the "economic detriment" finding) that the deportable person had "resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act" (*ibid.*). As amended by the 1948 Act, Section 19(c) appears in the Appendix, *infra*, p. 26.

however, it became necessary as a result of this Court's decision in the *Wong Yang Sung* case[4] to reopen the petitioner's case for all purposes. Accordingly, on June 6, 1950, the petitioner was advised that it was necessary to accord him a new hearing to determine his deportability (R. 83-84).

The new hearing opened on June 16, 1950, and, following a number of intervening sessions and continuances, was concluded on January 15, 1951 (R. 20-23, 24-36, 36-46, 46-53). The petitioner's deportability for failure to maintain his exempt status of a student was again established (see R. 67-69) and is not disputed. At the hearing the petitioner applied for suspension of deportation and in the alternative for the privilege of voluntary departure (R. 23, 37, 47).

During the period of the reopened proceedings, on September 23, 1950, the Act of October 16, 1918, as amended—deportability under which made an alien ineligible for the privilege either of suspension of deportation or voluntary departure in lieu of deportation (see Section 19(c) and (d) of the Immigration Act of 1917, Appendix, *infra*, pp. 26-27)—was amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006-1008, so as to make deportable any alien who then was, or at any time after entry had been, a member of (among other organizations) the Communist Party of the United States.[5] The effect of this amendment was to terminate the Attorney General's

[4] *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, decided February 20, 1950, holding that administrative proceedings for the deportation of aliens were required to conform to the provisions of the Administrative Procedure Act, 5 U.S.C. 1001-1011.

[5] The pertinent provisions of the 1918 Act, as thus amended, appear in the Appendix, *infra*, pp. 27-28. See *Galvan* v. *Press*, 347 U.S. 522.

discretionary authority under Section 19(c) to suspend deportation (or permit voluntary departure in lieu of deportation) in the case of any alien who was deportable because of membership in the Communist Party at any time since his entry into the United States.[5]

On October 2, 1950, following the enactment of the foregoing amendment, the hearing officer, at one of the sessions of the reopened hearing, advised the petitioner's counsel, who had objected to the examining officer's interrogation of the petitioner as to his residence prior to 1945 (R. 27), that, "[a]s your client is applying for a relief within the discretion of the Attorney General the Examining Officer may inquire into any of his residence[s] or any of his business while within the United States" (R. 28-29). "[T]he government", he told counsel, "is entitled to know all of the facts concerning the [petitioner] in order to determine his eligibility for any discretionary relief" (R. 31). Following further interrogation of the petitioner (R. 32-33), the examining officer asked the petitioner

[5] This flat prohibition of suspension of deportation or voluntary departure in the case of aliens deportable because of post-entry membership in the Communist Party was subsequently relaxed. Section 244(a)(5) of the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 215 (8 U.S.C. 1254(a)(5)), gives the Attorney General discretionary authority to suspend deportation in such cases under certain conditions. See *Jay* v. *Boyd*, 351 U.S. 345. The Attorney General must report each such case to Congress, and Congress must affirmatively approve the Attorney General's action before it can become effective (§ 244(c), 8 U.S.C. 1254(c)). Section 244(e) (8 U.S.C. 1254(e)) similarly gives the Attorney General authority, under prescribed conditions, to permit voluntary departure in such cases. These provisions of the 1952 Act, even if considered relevant to this case (but see fn. 14, *infra*, p. 16), do not eliminate the significance of Communist Party membership and, since relief requires proof of good moral character and continuous residence in this country for a period of ten years subsequent to termination of membership, the facts concerning membership still must be established.

whether he was a member of the Communist Party (R. 34). Counsel for the petitioner objected to the question on the ground that it was "in violation of the first and fifth amendment" (*ibid.*). The hearing officer overruled the objection and again pointed out that, since the petitioner was "applying for a relief within the discretion of the Attorney General", the government was "entitled to know [his] complete history" (*ibid.*). Counsel nevertheless advised the petitioner that he "need not answer", and the petitioner did not do so (R. 34, 35).

The examining officer said he saw no point in proceeding further with his examination of the petitioner and stated to the hearing officer that if there was "anything further to be developed to show that the [petitioner] is eligible for suspension it should be developed by the [petitioner] and the [petitioner's] attorney" (R. 35). The hearing officer at this point called the petitioner's counsel's attention to 8 C.F.R. (1949 ed.) 151.3(e) (Appendix, *infra*, p. 28), and pointed out that under that regulation "the burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien" (R. 35).

At the final session of the reopened hearing, on January 15, 1951 (R. 46-53), following the introduction of various documentary materials pertaining to the petitioner's request for discretionary relief[7] and further

[7] These included the report of an investigation by the Immigration and Naturalization Service into the petitioner's background and employment record (Ex. 10, R. 45, 59-62), two good-character affidavits (Ex. 5, R. 37, 54-55; Ex. 14, R. 47, 64-65), and a commendation for services rendered by the petitioner from July to September 1945 on behalf of a unit of the Office of Strategic Services (Ex. 15, R. 48-51, 66-67).

testimony by the petitioner (R. 37-40, 43-44, 48-51), the petitioner's attention was called to the question which he had refused to answer—whether he was a member of the Communist Party—and he was asked if he wished to "stand on that record" or to "amplify it" (R. 51-52). Following a consultation with his counsel, the petitioner stated that he would "decline to answer that question on the ground of self-incrimination" (R. 52). He was then asked if he had "ever been a member of the Communist Party", and he declined to answer that question as well, "[o]n the same ground" (R. 53).

In a decision dated January 15, 1951 (R. 67-73), the hearing officer, having found the petitioner to be deportable on the charge of the original warrant (failure to maintain the exempt status of a student under which he was admitted), recommended that he be deported pursuant to law[5] (R. 67-69, 73). With respect to the petitioner's application for discretionary relief, the officer, after referring to the petitioner's refusal at the hearing to answer whether he was or ever had been a member of the Communist Party (R. 71), said (R. 71-72):

> The provisions of Section 19(c) (1) and (2) of the Immigration Act of 1917, as amended [Appendix, *infra*, p. 26], provide that certain relief may be granted aliens within the discretion of the Attorney General. This relief is purely discretionary with the Attorney General and no right to the relief vests with the alien. In considering an alien for discretionary relief the Government of

[5] The hearing officer also recommended that the order of the Board of Immigration Appeals of April 17, 1943 (*supra*, pp. 3-4), granting the privilege of voluntary departure in lieu of deportation, be withdrawn (R. 73).

the United States is entitled to know his entire background and whether or not he is or has been a member of a proscribed organization, and any information which would show whether or not he is a person to whom the discretionary relief provided in Section 19(c) should be extended. By declining to answer questions as to whether he had ever been a member of a proscribed organization, on the ground of self-incrimination, the respondent denies [*sic*] the government of knowledge to which it is entitled and the respondent places himself in a class of aliens to whom discretionary relief as provided by Section 19(c) of the Immigration Act of 1917, as amended, is not available.

In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.[9]

The hearing officer's findings of fact on the question of the petitioner's eligibility for discretionary relief were in pertinent part (R. 72):

* * * * *

(2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;

(3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self-incrimination;

* * * * *

(5) That the respondent declines to answer questions on the ground of self incrimination which might establish that the respondent is

[9] Under Section 19(c) such proof was a prerequisite to the granting of discretionary relief.

> deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended [Appendix, *infra*, pp. 26-27].

He accordingly concluded as a matter of law that, under Section 19(c), the petitioner had failed to establish statutory eligibility either for suspension of deportation or for voluntary departure in lieu of deportation (R. 73).

On March 13, 1951, the Acting Assistant Commissioner of Immigration and Naturalization, Adjudications Division, adopted the recommendation of the hearing officer and ordered the petitioner deported (R. 73-75). Remarking that the petitioner's "refusal to answer questions with respect to his background and affiliations on the ground of self-incrimination indicates that this is not the type of case in which the granting of discretionary relief is warranted," she concluded that "[a]s a matter of administrative discretion, the facts and circumstances in this case do not warrant the exercise of any discretionary relief" (R. 74).

On appeal by the petitioner to the Board of Immigration Appeals, the Board, on January 22, 1952, held that the petitioner was "not entitled to any form of discretionary relief at this time", and ordered that his application for suspension of deportation or in the alternative for voluntary departure be denied and the appeal dismissed (R. 79). In an accompanying opinion (R. 75-79), the Board, with respect to the petitioner's refusal on self-incrimination grounds to state whether he was or ever had been a member of the Communist Party, said (R. 77-78):

> The right of a defendant against self-incrimination in a criminal prosecution is not the same as

> the right of this Board to know all pertinent information about an applicant for suspension of deportation. This is not a criminal prosecution. Respondent is asking a special favor and must be willing to permit a thorough examination of his eligibility for that favor. Membership in the Communist Party, present or past, is most pertinent to an application for suspension, because under Section 19(d) of the 1917 Act and under Section 22 of the Internal Security Act, amending the Act of 1918 [Appendix, *infra*, pp. 26-28], Communist Party membership precludes a grant of suspension or of any relief, including voluntary departure.[10]

The petitioner thereafter filed this suit in the United States District Court for the Southern District of California for review of the deportation order and for injunctive relief (R. 1-5). His amended complaint, filed April 23, 1957, alleged that the denial by the Immigration and Naturalization Service of his application for suspension of deportation "was predicated upon a determination against [his] eligibility for such relief despite the clear affirmative evidence presented in support thereof and the absence of any evidence contrary thereto" (R. 4). Accordingly, it was alleged, the denial was "illegal because it was arbitrary and capricious" (*ibid.*). The district court, on July 30, 1957,

[10] The Board, in addition, after referring to its order of April 17, 1943 (*supra*, pp. 3-4) granting the petitioner the privilege of voluntary departure within 90 days after the issuance to him of an exit permit or 90 days after the date on which exit permits ceased to be required, whichever should come sooner, stated that it had been informed by the State Department that exit permits ceased to be required in October 1948 (R. 79). Remarking that the petitioner had neglected to depart within 90 days after the latter date, the Board said that, since the privilege of voluntary departure had been granted to him once and he had failed to avail himself of it, "'[w]e are not going to grant it again'" (*ibid.*).

upheld the decision of the Immigration and Naturalization Service and the Board of Immigration Appeals declaring the petitioner ineligible for discretionary relief (R. 8-12). The court held that "[t]he finding of the hearing officer, as affirmed by the Board of Immigration Appeals, that [petitioner] had not affirmatively proved that he had been a person of good moral character for the past five years, and that he was ineligible for the discretionary relief of suspension of deportation under the provisions of Section 19(c) of the Immigration Act, as amended [8 U.S.C. 155(c) 1940 Ed.][11] is supported by reasonable, substantial and probative evidence" (R. 10).

On appeal by the petitioner, the Court of Appeals for the Ninth Circuit affirmed the judgment of the district court (R. 80-95). That court stated that an affirmative answer by the petitioner to the question whether he was or ever had been a member of the Communist Party would have established his deportability under the Act of October 16, 1918, as amended (Appendix, *infra*, pp. 27-28), and his consequent statutory ineligibility under Section 19(d) of the Immigration Act of 1917, as amended (Appendix, *infra*, pp. 26-27), for the relief of suspension of deportation (R. 92-93). The court further found no error in the hearings officer's determination that the petitioner, by failing to answer the questions, had not sustained his burden of affirmatively proving that he was a person of good moral character and that he was not statutorily ineligible for the relief which he sought (R. 93).

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[11] Appendix, *infra*, p. 26.

SUMMARY OF ARGUMENT

I

In order to support his application, the petitioner, as an applicant for the privilege of supension of deportation, had the burden of stating, at the request of the immigration authorities, whether he was or had been a member of the Communist Party, since this information directly bore on his statutory eligibility for the relief which he sought.

A. The petitioner was an applicant for a privilege to which Congress attached prescribed eligibility requirements. One of the requirements in effect at the time here pertinent under the Internal Security Act of 1950 was that the applicant not be, or since entry have been, a member of the Communist Party. Unless this requirement was met, the Attorney General lacked power to grant an application for suspension of deportation.

B. An applicant for suspension of deportation must provide pertinent information as to his eligibility to the Attorney General, whose favorable consideration he seeks, in connection with the latter's discharge of his responsibility of seeing to it that legally disqualified persons are not considerd for this relief. Since at the time in question aliens who were, or since entry had been, members of the Communist Party were ineligible for this privilege, the petitioner had the duty to state at the hearing, when he was questioned on the subject, whether he was or had been a member of that organization.

C. Since the petitioner was properly asked whether he was or had been a Communist Party member, his

refusal to do so justified the denial of his application regardless of his reason for refusing. The fact that he gave as the reason for his refusal that to answer would tend to incriminate him may have justified his silence, but it could not provide support for his application.

II

The hearing officer's finding that the petitioner failed to prove his good moral character by declining to answer the questions need not be considered since this was an alternative basis of his decision and was in any event not adopted by the Board of Immigration Appeals.

III

We agree with the petitioner that no question of abuse of discretion, or the propriety of its exercise, is presented in the present posture of the case, since discretion was not exercised by the Board of Immigration Appeals.

ARGUMENT

I

IN ORDER TO SUPPORT HIS APPLICATION FOR SUSPENSION OF DEPORTATION, THE PETITIONER HAD THE BURDEN OF STATING ON REQUEST WHETHER HE WAS OR HAD BEEN A MEMBER OF THE COMMUNIST PARTY SINCE THIS INFORMATION DIRECTLY BORE ON HIS STATUTORY ELIGIBILITY FOR THE PRIVILEGE WHICH HE SOUGHT

A. The Petitioner Was an Applicant for a Privilege to Which Congress Attached Prescribed Eligibility Requirements

Correct determination of the question presented in this case requires proper emphasis on the nature of the relief for which the petitioner was an applicant in the proceedings under review. The petitioner is an admittedly deportable alien. At his deportation hearing he sought to take advantage of a statutory privilege, the suspension of his deportation. In so doing he asked

for a favor—a special dispensation authorized by Congress to be granted by the Attorney General, in that official's discretion, to applicants who meet fixed eligibility requirements which Congress itself has imposed.

This Court has stressed the "gratuitous nature" of this relief. *Jay* v. *Boyd*, 351 U.S. 345, 359; *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77. Its granting or denial, said the Court, lies within the Attorney General's "unfettered discretion." *Jay* v. *Boyd, supra*, 351 U.S. at 354, 357-358. "Like probation or suspension of criminal sentence, it 'comes as an act of grace' " and "is analogous to the Board of Parole's powers to release federal prisoners on parole." *Id.* at 354. It is "a matter of discretion and of administrative grace." *Hintopoulos* v. *Shaughnessy, supra*, 353 U.S. at 77.[12]

But Congress has limited the authority of the Attorney-General by fixing certain minimum standards, in the form of statutory eligibility requirements. *Jay* v. *Boyd, supra*, 351 U.S. at 353; *Hintopoulos* v. *Shaughnessy, supra*, 353 U.S. at 77. Among the requirements in effect at the time here pertinent—under the Internal Security Act of 1950—were that the applicant have been a person of good moral character for the preceding five years, that he not be ineligible for naturalization (or, if ineligible, that the ineligibility be solely by reason of race), and that he have resided continuously

[12] Compare *United States, ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491, where Judge Learned Hand, for the Second Circuit, likened the power to suspend deportation to the President's pardoning power. The analogy was quoted with approval by this Court in the *Jay* case, *supra*, 351 U.S. at 354, n. 16. This Court also referred with approval to congressional sources which likened the power of suspension to the granting of "clemency" or "amnesty" (*ibid.*).

in the United States for seven years or more and have been residing here on July 1, 1948 (or in the alternative that his deportation would result in serious economic detriment to a citizen or legally resident spouse, parent, or minor child).[13] Another requirement—here the most important—was that he not be, or since entry have been, a member of the Communist Party.[14] Unless these eligibility requirements were met, an application for suspension could not be granted; the Attorney General lacked the power to grant it.

B. An Applicant for the Privilege of Suspension of Deportation Must Provide the Attorney General With Pertinent Information on His Eligibility

An applicant for the privilege of suspension of deportation has, at a minimum, the burden of proffering the essential information to the Attorney General, whose favorable consideration he solicits, in order that

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[13] Section 19(c) of the Immigration Act of February 5, 1917, as amended (Appendix, *infra*, p. 26).

[14] Section 19(c) and (d) of the Immigration Act of February 5, 1917, as amended; Sections 1(2)(C), and 4 of the Act of October 16, 1918, as amended (Appendix, *infra*, pp. 26-28). See *supra*, pp. 5-6.

We stress that this case arises, and must be decided, under the stringent provisions of the Internal Security Act of 1950, which barred suspension of deportation for aliens in the so-called subversive classes. In the 1952 Act, Congress relaxed this prohibition by allowing suspension for aliens in this category who meet certain strict standards (see footnote 6, *supra*, p. 6), but this case arises and must be governed solely by the earlier legislation since petitioner's application was presented and decided under that legislation. In any event, as pointed out in footnote 6, the answer would be the same under the 1952 Act, which requires separation from Communism for at least ten years in order for the alien to be eligible for suspension; petitioner refused to tell whether he was a present member of the Communist Party, not only whether he had been a member in the past, and such information was necessary for a determination of whether he had been separated from the Party for the requisite number of years.

the Attorney General have an adequate basis to determine whether or not the applicant is eligible to receive this form of relief. Upon request, the applicant, at the least, has the duty to supply information within his knowledge having a direct and immediate bearing—not on his worthiness for the privilege as a matter of discretion (though he plainly has that duty too)—but on his qualifications to be considered for it under the law.

The petitioner concedes that, at the time here pertinent, aliens who were, or since entry had been, members of the Communist Party were legally ineligible for the privilege of suspension of deportation (Br. 2-3, 5, 15). To support his application he had the burden, therefore, as a condition of having his application considered, to state at the hearing, when he was questioned on the subject, whether he was or had been a Party member. As the Board of Immigration Appeals observed, "[Petitioner] is asking a special favor and must be willing to permit a thorough examination of his eligibility for that favor" (R. 77; *supra*, p. 11). It is, in short, unreasonable for an applicant for discretionary relief to withhold from the official whose discretion he invokes, on the latter's demand, information as to a fact within his knowledge which under the law would forbid the granting of the relief. See *Nelson* v. *County of Los Angeles*, No. 152, this Term, decided February 29, 1960; *Lerner* v. *Casey*, 357 U.S. 468, 475-476; *Beilan* v. *Board of Education*, 357 U.S. 399, 405-409; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 720.[15]

This case, indeed, follows *a fortiori* from those cases. Each of them sustained the right of a city or county to

[15] See also *Slochower* v. *Board of Education*, 350 U.S. 551, 556, 558.

discharge an employee for refusing (on constitutional grounds, as here) to answer questions pertaining to Communist Party membership which the city or county authorities asked or directed to be answered. This case involves a governmental action more plainly required than the actions upheld in those cases. In each of those cases the adversely affected person was deprived of something of value which he had previously enjoyed and possessed, his employment and livelihood, by reason of his refusal to provide information which need not necessarily have led to his discharge. The petitioner was denied a gratuitous benefit for which he had but filed a petition. What is more important, the information which the petitioner was asked to supply was, as we have said, needed by the Attorney General in the discharge of his duty of ascertaining the applicant's legal eligibility for the relief which he sought. Nothing comparable to this latter factor was present in any of the earlier cases.

Konigsberg v. *State Bar of California*, 353 U.S. 252, does not support petitioner's position. There, although the petitioner was in a similar posture to the present petitioner in that he was making an application for a "license" (albeit a "license" of a far different kind), the denial was not based on the fact that he had refused to provide necessary information, but specifically on the fact that he had failed to demonstrate that he was a person of good moral character, a factor comparable to the alternative basis for the finding of the hearing officer here (*supra*, p. 9), but not comparable to the first basis. 353 U.S. 252, 259.

The petitioner attempted to show that, as regards the disqualifying factor of membership in the Communist Party, the burden was on the Attorney General to

prove the petitioner was not qualified, rather than on the petitioner to prove that he was (Br. 12-14).[16] But this effort by the petitioner, in addition to being inconsistent with the regulation placing "upon the alien" the burden of proof as to "the statutory requirements precedent to the exercise of discretionary relief",[17] is beside the mark. The petitioner was *not asked to "prove" his non-membership* in the Party.[18] He was merely asked by the government

[16] The argument, based on the textual structure of Section 19(*e*) of the Immigration Act of 1917, Appendix, *infra*, p. 26, and alleged "standard principles of construction", is that, since the disqualifying factor of Communist Party membership appears in the text of Section 19(e) as "an exception to the general operation of the suspension statute", the "burden of proving the disqualification is on the party claiming that the exception applies" (Br. 13). Two decisions of this Court involving questions far afield from that at bar *viz.*, whether a plaintiff suing under a statute in which there is a proviso creating an exception to the statute's applicability must negative the proviso or whether the defendant must set up the proviso if he wishes to rely on it (*Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U.S. 1), and a similar question involving a "condition subsequent embodied in a proviso" to a contract (*Javierre* v. *Central Altagracia*, 217 U.S. 502, 507-508) are relied on. For the reasons stated in the text, the issues in those cases were wholly unlike the issue at bar, and the petitioner's reliance on them is accordingly misplaced. Moreover, in this case the clause barring Communist Party members from the benefits of the suspension statute (through the parenthetical language, "other than one to whom subsection (d) of this section is applicable") is not a "proviso" tacked on to the end of a statute or section of a statute (as in *Schlemmer*, for example), but appears at the very beginning of Section 19(e) as an absolute disqualifying factor, to which all the other eligibility factors specified in the statute are subordinate.

[17] 8 C.F.R. (1949 ed.) 151.3(e), as amended, Appendix, *infra*, p. 28; now, in substance, 8 C.F.R. (1958 rev.) 242.16(e). As we have pointed out (*supra*, p. 7), this provision was expressly called to the attention of the petitioner and his counsel at the hearing.

[18] Except, of course, to the extent that his denial of membership constituted such proof.

to answer a question. There is no issue here, as the petitioner suggests, of a construction of Section 19(*c*) of the Immigration Act of 1917 which would require the petitioner to "prove a negative" (Br. 13). The petitioner was not asked to "prove a negative"; he was asked to state whether he was or had been a member of the Communist Party. This was a fact within his knowledge, on the answer to which, as we have said, depended his legal eligibility for the privilege he was seeking. He accordingly had the burden of supplying the requested information as a condition of having his application further considered.

C. Since the Petitioner Was Properly Asked Whether He Was or Had Been a Member of the Communist Party, His Refusal to do so Justified the Denial of His Application Regardless of His Reason for Refusing

We have shown that the petitioner was properly asked, in order to qualify for consideration of his application for suspension, whether he was or had been a member of the Communist Party, since on that question depended his eligibility for the favor sought. This being so, his refusal to supply the information justified, and indeed required, the denial of his petition, regardless of his reason for refusing. The fact that he gave as his reason that to answer would tend to incriminate him is immaterial. It was his refusal to answer, not his reason for refusing, which warranted the action taken. Cf. *Nelson* v. *County of Los Angeles*, No. 152, this term, decided February 29, 1960; *Lerner* v. *Casey*, 357 U.S. 468, 475-477. The case thus presents no question of an improper inference from a claim of constitutional privilege.[19]

[19] Cf. *Grunewald* v. *United States*, 353 U.S. 391, 421; *Slochower* v. *Board of Education*, 350 U.S. 551, 557-558; *Ullmann* v. *United States*, 350 U.S. 422, 426-427.

By this same token, there is no merit to the petitioner's argument that this case involves a "choice" between requiring an applicant for discretionary relief to supply, at the immigration authorities' request, information touching on his eligibility for the relief sought and "giving respect to the constitutional privilege" (Br. 15). Since it was reasonable for the immigration officials to demand the information as a condition of considering the application, the petitioner's refusal to supply the information—for whatever reason—warranted their refusal to give the application further consideration. The fact that the petitioner invoked the Fifth Amendment as his reason for refusing may have justified his silence, but it could not provide support for his application.

II

THE HEARING OFFICER'S FINDING THAT THE PETITIONER FAILED TO PROVE HIS GOOD MORAL CHARACTER NEED NOT BE CONSIDERED SINCE THIS WAS AN ALTERNATIVE BASIS OF DECISION AND WAS IN ANY EVENT NOT ADOPTED BY THE BOARD OF IMMIGRATION APPEALS

The hearing officer based his determination of the petitioner's ineligibility for discretionary relief on alternative grounds (see *supra*, pp. 8-10). One was the ground considered *supra*, pp. 14-21, *viz.*, that the petitioner, by refusing to answer the questions, deprived the immigration authorities of information within his power to supply, which they were entitled to have in considering his application. The other was that (R. 72; *supra*, p. 9):

> In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded, the [petitioner] has not affirmatively

proved that he has been a person of good moral character for the past five years.[20]

Since, for the reasons previously stated, the former of these alternative grounds is sound, and since it suffices by itself to support the officer's determination, there is no occasion to consider for purposes of this case the validity of the latter ground.[21] Cf. *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Debs* v. *United States*, 249 U.S. 211, 216. Furthermore, the Board of Immigration Appeals, which in substance adopted the former of the hearing officer's alternative grounds of deci-

[20] Such proof was a prerequisite to the granting of discretionary relief (Appendix, *infra*, p. 26).

[21] The hearing officer did not, as the petitioner appears to imply (Br. 10), make an "inference of guilt" from the petitioner's invocation of the privilege against self-incrimination. Nor did he infer *bad* moral character from the petitioner's refusal to answer questions pertaining to Communist Party membership. He merely concluded that by declining to answer the questions the petitioner had failed to sustain his burden of "affirmatively prov[ing]" (R. 72) good moral character during the requisite five-year period—a view approved by both courts below (R. 10, 93; *supra*, pp. 11-12). Presumably the officer's reasoning was that by refusing answers to these questions the petitioner closed the door to a line of inquiry which might or might not have uncovered facts having a bearing on his moral character. In view of the "widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States *by force and violence*, a view which has been given formal expression by the Congress" (*Barenblatt* v. *United States*, 360 U.S. 109, 128; emphasis added) and this Court's recognition of "the close nexus between the Communist Party and violent overthrow of government" (*ibid.*), such a viewpoint cannot be said, we think, to be without a rational logical basis. This aspect of the officer's findings, however, presents a problem of reconciliation with *Konigsberg* v. *State Bar of California*, 353 U.S. 252, and, since there is no need to inquire further into the question for present purposes, we do not do so.

sion, did not adopt the aspect of his decision relating to moral character (R. 75-79; *supra*, pp. 10-11). Since the Board is the personal representative of the Attorney General in all matters pertaining to deportation[22]—his "last delegate,"[23] so to speak, in the administrative process—its decision was the final and controlling one, and the only one which need now be considered.

III

NO QUESTION OF ABUSE OF DISCRETION IS BEFORE THE COURT SINCE DISCRETION WAS NOT EXERCISED BY THE BOARD OF IMMIGRATION APPEALS

The Acting Assistant Commissioner evidently intended to deny the petitioner's application for suspension of deportation "[a]s a matter of administrative discretion" (R. 74; *supra*, p. 10).[24] The petitioner, noting that this ruling was made in an "intermediate administrative appeal," says it is doubtful that this case "presents in the present posture the question of

[22] The Board is "under the supervision and direction of the Attorney General" and "responsible solely to him" (8 C.F.R. (1958 rev.) 3.1(a), as amended, 23 F.R. 9117). It exercises "such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case" (*id.*, § 3.1(d)(1)). Its decision is "final except in those cases reviewed by the Attorney General" (*id.*, § 3.1(d)(2)) and is "binding on all officers and employees of the [Immigration and Naturalization] Service (*id.*, § 3.1(g)). (The corresponding provisions in effect at the time here pertinent were contained in 8 C.F.R. (1949 ed.) 90.2, 90.3(e), and 90.3(d).)

[23] The phrase is petitioner's (Br. 17).

[24] Her statement was: "As a matter of administrative discretion, the facts and circumstances in this case do not warrant the exercise of any discretionary relief" (R. 74; *supra*, p. 10). We infer from the context (see particularly the sentence immediately preceding) that she meant that the facts and circumstances of the case did not warrant the granting of any discretionary relief.

whether the Attorney General's discretion was abused," because "discretion was not exercised by the Attorney General's last delegate, the Board of Immigration Appeals" (Br. 17). We agree with the petitioner's interpretation of the Board's opinion (R. 75-79; *supra*, pp. 10-11) that the Board did not purport to exercise discretion, at least with respect to the request for suspension of deportation.[25] As we read its opinion, the Board held that the petitioner, by his refusal to answer relevant questions, failed to establish his eligibility for consideration for the discretionary suspension of his deportation. We therefore also agree with the petitioner that no question of abuse of discretion, or the propriety of its exercise, is presented in the present posture of the case.[26]

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[25] The Board apparently denied petitioner's request for voluntary departure as a matter of discretion (see fn. 10, *supra*, p. 11), though the same eligibility considerations (as regards Communist Party membership) applied to the suspension and the voluntary departure aspects of his application for discretionary relief (Section 19(c) of the 1917 Immigration Act, as amended, Appendix, *infra*, p. 26), as the Board indeed recognized (R. 78; *supra*, pp. 10-11).

[26] We do not, on the other hand, agree with the petitioner's analysis (Br. 17-18) of what is involved "if the question of discretion is here" (Br. 17). If "the question of discretion is here," the petitioner argues, "it was unconstitutional, and at a minimum an abuse of discretion, to deny discretionary relief solely because petitioner had relied on his constitutional privilege" (*ibid.*). We do not agree, however, that the Acting Assistant Commissioner intended to deny discretionary relief "because petitioner had relied on his constitutional privilege." It is true that that official, in referring in her ruling to the petitioner's refusals to answer, mentioned the ground of refusal which the petitioner invoked ("on the ground of self-incrimination") (R. 74, see *supra*, p. 10). But it does not follow that she meant to deny relief because of the *reason* the petitioner gave for refusing to supply the requested information. Her ruling is at least equally susceptible to the interpretation that, in her opinion, discretionary relief should not be granted to an applicant who was unwilling

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

APRIL 1960.

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to submit to a thorough inquiry into his background and affiliations *regardless of* the reason or stated reason for his lack of candor. There would, of course, have been nothing improper about such an approach. Cf. our argument, *supra*, pp. 14-21, that an application for discretionary relief can properly be refused any consideration whatever where the applicant refuses to supply information relevant to his eligibility, regardless of the reason he might invoke for his refusal.

APPENDIX

Statutes and Regulation Involved

1. Section 19 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended by the Act of June 28, 1940, c. 439, Section 20, 54 Stat. 671, 672-673, and the Act of July 1, 1948, c. 783, 62 Stat. 1206, provided in pertinent part:[27]

Sec. 19

* * *

* * * * * *

(c) [8 U.S.C. (1946 ed., Supp. II) 155(c).] In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *

(d) [8 U.S.C. (1946 ed.) 155(d).] The provisions of subsection (c) shall not be applicable in

[27] The Immigration Act of February 5, 1917, as amended, was repealed by the Immigration and Nationality Act of June 27, 1952, c. 477, Section 403(a)(13), 66 Stat. 279. However, the latter Act took effect subsequent to the period involved in this case (*see supra*, pp. 3-11). In addition, the saving clause of the 1952 Act (Section 405(a), 66 Stat. 280) preserved the validity of pending proceedings. Cf. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 261, n. 1. The present provisions applicable to suspension of deportation are contained in Section 244 of the 1952 Act (8 U.S.C. 1254).

the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008;[28] U.S.C., title 8, sec. 137), entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes," as amended; * * *.

2. The Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Internal Security Act of 1950, c. 1024, Section 22, 64 Stat. 1006-1008, provided in pertinent part:[29]

> [Sec. 1] [8 U.S.C. (1946 ed., Supp. IV) 137.] Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;
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> * * * * * *

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[28] So in the original (54 Stat. 672). Probably should read "40 Stat. 1012, 41 Stat. 1008."

[29] The Act of October 16, 1918, as amended, was repealed by the Immigration and Nationality Act of June 27, 1952, c. 477, Section 403(a)(16), 66 Stat. 279. For the same reasons as those indicated in footnote 27, *supra*, page 26, the repeal does not affect this case.

Sec. 4 [8 U.S.C. (1946 ed., Supp. IV) 137-3]. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

* * * * * *

3. 8 C. F. R. (1949 ed.) 151.3(e), as amended, 15 F. R. 7638, November 10, 1950,[30] provided in pertinent part:

§ 151.3 * * *

* * * * * *

(e) *Application for discretionary relief.* At any time during the hearing under the warrant of arrest the alien may apply for suspension of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation * * *. The burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien. * * *

[30] Now contained in 8 C. F. R. (1958 rev.) 242.16(e).

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SUPREME COURT OF THE UNITED STATES

No. 139.—October Term, 1959.

Diamond Kimm, Petitioner, v. George K. Rosenberg, District Director, Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 13, 1960.]

Per Curiam.

Petitioner applied for suspension of an order directing his deportation to Korea or permitting his voluntary departure. He does not question the validity of the deportation order, but contends that he is within the eligible statutory class whose deportation may be suspended at the discretion of the Attorney General. § 19 (c) of the Immigration Act of 1917, as amended. Relief on this score was denied on the basis that the Attorney General has no power to exercise his discretion in that regard since petitioner failed to prove his eligibility under that section and the Internal Security Act of 1950.

Before the hearing officer, petitioner was asked if he was a member of the Communist Party. He refused to answer, claiming the Fifth Amendment privilege against self-incrimination. The officer refused the suspension on the grounds that petitioner had failed to prove that he was a person of good moral character and that he had not met the statutory requirement of showing that he was not a member of or affiliated with the Communist Party. The Board of Immigration Appeals affirmed on the latter ground, as did the Court of Appeals. 263 F. 2d 773.

Petitioner contends that he presented "clear affirmative evidence" as to eligibility which stands uncontradicted

and that the burden was on the Government to show his affiliations, if any, with the Party. He contends that the disqualifying factor of Communist Party membership is an exception to § 19 (c) which the Government must prove. We think not. Rather than a proviso, it is an absolute disqualification, since that class of aliens is carved out of the section at its very beginning by the words "other than one to whom subsection (d) of this section is applicable." [1] Subsection (d) [2] referred to aliens deportable under the Act of October 16, 1918. Section 22 of the Internal Security Act of 1950 amended the 1918 Act to include Communists,[3] and thus terminated the dis-

[1] Section 19 (c) provided, in relevant part:
"In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . (2) suspend deportation of such alien if he is not ineligible for naturalization . . . if he finds . . . (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. . . ." 8 U. S. C. (1946 ed., Supp. II) § 155 (c).

[2] Section 19 (d):
"The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008; U. S. C., title 8, sec. 137), entitled 'An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes,' as amended . . . ." 8 U. S. C. (1946 ed.) § 155 (d).

[3] The Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Internal Security Act of 1950, c. 1024, § 22, 64 Stat. 1006–1008, provided in pertinent part:
"Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

. . . . . .

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

. . . . . .

"(c) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of

cretionary authority under § 19 (c) as to any alien who was deportable because of membership in the Communist Party. Petitioner offered no evidence on this point, although the regulations place on him the burden of proof as to "the statutory requirements precedent to the exercise of discretionary relief." 8 CFR, 1949 ed., § 151.3 (e), as amended, 15 Fed. Reg. 7638. This regulation is completely consistent with § 19 (c). The language of that section, in contrast with the statutory provisions governing deportation, imposes the general burden of proof upon the applicant.

It follows that an applicant for suspension, "a matter of discretion and of administrative grace," *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72, 77 (1957), must, upon the request of the Attorney General, supply such information that is within his knowledge and has a direct bearing on his eligibility under the statute. The Attorney General may, of course, exercise his authority of grace through duly delegated agents. *Jay* v. *Boyd*, 351 U. S. 345 (1956). Perhaps the petitioner was justified in his personal refusal to answer—a question we do not pass upon—but this did not relieve him under the statute of the burden of establishing the authority of the Attorney General to exercise his discretion in the first place.

Affirmed.

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the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt . . . ."

"SEC. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported . . . ."

SUPREME COURT OF THE UNITED STATES

No. 139.—October Term, 1959.

Diamond Kimm, Petitioner, v. George K. Rosenberg, District Director, Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 13, 1960.]

Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Black concur, dissenting.

It has become much the fashion to impute wrongdoing to or to impose punishment on a person for invoking his constitutional rights.[1] Lloyd Barenblatt has served a jail sentence for invoking his First Amendment rights. See *Barenblatt* v. *United States*, 360 U. S. 109. As this is written, Dr. Willard Uphaus, as a consequence of our decision in *Uphaus* v. *Wyman*, 360 U. S. 72, is in jail in New Hampshire for invoking rights guaranteed to him by the First and Fourteenth Amendments. So is the mathematician, Horace Chandler Davis, who invoked the First Amendment against the House Un-American Activities Committee. *Davis* v. *United States*, 269 F.

[1] Meiklejohn, Political Freedom (1960) pp. 154–155 after referring to the efforts of legislative committees to compel Americans to give testimony "about their political beliefs and affiliations" goes on to say: ". . . in that field, the Fifth and the First Amendments are joined together, as their motives have been joined for centuries, in requiring of free citizens and of free institutions that they resist with all their might the irresponsible usurpations of a legislature which would attempt to tell men what they may believe and what they may not believe, with whom they may associate and with whom they may not associate."

2d 357 (C. A. 6th Cir.). Today we allow invocation of the Fifth Amendment to serve, in effect though not in terms, as proof that an alien lacks the "good moral character" which he must have under § 19 (c) of the Immigration Act in order to become eligible for the dispensing powers entrusted to the Attorney General.

The import of what we do is underlined by the fact that there is not a shred of evidence of bad character in the record against this alien. The alien has fully satisfied the requirements of § 19 (c) as shown by the record. He entered as a student in 1928 and pursued his studies until 1938. He planned to return to Korea but the outbreak of hostilities between China and Japan in 1937 changed his mind. Since 1938 he has been continuously employed in gainful occupations. That is the sole basis of his deportability.[2] The record shows no criminal convictions, nothing that could bring stigma to the man. His employment since 1938 has been as manager of a produce company, as chemist, as foundry worker, and as a member of O. S. S. during the latter part of World War II. He also was self-employed in the printing business, publishing a paper "Korean Independence." No one came forward to testify that he was a Communist. There is not a word of evidence that he had been a member of the Communist Party at any time. The only thing that stands in his way of being eligible for suspension of deportation by the Attorney General is his invocation of the Fifth Amendment.

The statute says nothing about the need of an alien to prove he never was a Communist. If the question of Communist Party membership had never been asked and petitioner had never invoked the Fifth Amendment, can it be that he would still be ineligible for suspension? It

[2] Petitioner was admitted as a student pursuant to § 4 (e) of the Immigration Act of 1924. 43 Stat. 155, 8 U. S. C. (1946 ed.) § 204 (e).

is for me unthinkable. Presumption of innocence is too deeply ingrained in our system for me to believe that an alien would have the burden of establishing a negative. What the case comes down to is simply this: invocation of the Fifth Amendment creates suspicions and doubts that cloud the alien's claim of good moral character.

Imputation of guilt for invoking the protection of the Fifth Amendment carries us back some centuries to the hated oath *ex officio* used both by the Star Chamber and the High Commission. Refusal to answer was contempt.[3] Thus was started in the English speaking world the great rebellion against oaths that either violated the conscience of the witness or were used to obtain evidence against him. See *Ullmann* v. *United States*, 350 U. S. 422, 445–449 (dissenting opinion).

I had assumed that invocation of the privilege is a neutral act, as consistent with innocence as with guilt. We pointed out in *Slochower* v. *Board of Education*, 350 U. S. 551, 557–558: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous

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[3] See Maguire, Attack of the Common Lawyers in the Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England, Essays in History and Political Theory (1936), c. VII, p. 199, at 215, where the procedure of the High Commission is described:

"Thus the defendant swore to answer fully and truly all questions which might be put to him before he knew the charges in detail, and in cases *ex officio* without knowing the accuser. Either party could produce witnesses who gave their depositions on oath, but in the most important cases *ex officio mero* the whole trial was based on the answers of the defendant. As in the Star Chamber the judges delivered their opinions *seriatim* and the decree accorded with the decision of the majority.

"Thus the crux of the procedure was the oath *ex officio*. Until the defendant had been sworn, the articles for his examination could not be produced; until he had been examined, the case could not proceed to trial. Refusal or partial answers constituted contempt, followed by imprisonment; perjury was a cardinal sin."

circumstances." We re-emphasized that view in *Grunewald* v. *United States*, 353 U. S. 391, 421: "Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men."

We went further in *Konigsberg* v. *State Bar*, 353 U. S. 252, 267, and in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 246, and held that even past membership in the Communist Party was not by itself evidence that the person was of bad moral character.

We therefore today make a marked departure from precedent when we attach a penalty for reliance on the Fifth Amendment. The Court in terms does not, and cannot, rest its decision on the ground that by invoking the Fifth Amendment the petitioner gave evidence of bad moral character. Yet the effect of its decision is precisely the same. In so holding we disregard history and, in the manner of the despised oath *ex officio*, attribute wrongdoing to the refusal to answer. It seems to me indefensible for courts which act under the Constitution to draw an inference of bad moral character from the invocation of a privilege which was deemed so important to this free society that it was embedded in the Bill of Rights.

SUPREME COURT OF THE UNITED STATES

No. 139.—October Term, 1959.

Diamond Kimm, Petitioner, v. George K. Rosenberg, District Director, Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 13, 1960.]

Mr. Justice Brennan, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

Suspension of deportation may be "a matter of discretion and of administrative grace," *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U. S. 72, 77, but eligibility for suspension, for the exercise of that discretion, is very much a matter of law. *McGrath* v. *Kristensen*, 340 U. S. 162, 169. The decision of the Board of Immigration Appeals was that petitioner was not, under the governing statute, eligible for suspension; and on that basis its order must stand or fall in court. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87.

The only basis of the Appeals Board's determination of ineligibility that the Government seriously defends here is the Board's finding that the petitioner had not shown he was not deportable under §§ 1 and 4 of the Act of October 16, 1918, 40 Stat. 1012, as amended by § 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008. Those provisions retroactively made deportable an alien who had been a Communist Party member at any time since his entry into the United States; and § 19 of the 1917 Immigration Act, 39 Stat. 889, as later amended,[1] under which

[1] The suspension provisions, with their reference to deportability under the 1918 Act as a disqualification, were added to the old § 19 through the amendments of 1940 and 1948, 54 Stat. 672, 62 Stat. 1206. The validity of the proceedings here is to be tested under the law

petitioner's eligibility for suspension was determined, made those aliens who were deportable on that basis ineligible for suspension of deportation.

It has not been, and scarcely could be controverted that the Government must in general bear the burden of demonstrating, in administrative proceedings, the deportability of an alien; whatever the exceptions to this rule may be,[2] it was established by the time relevant here that where post-entry misconduct is charged as the basis for deportability, the burden is the Government's. *Hughes* v. *Tropello*, 296 F. 306, 309; *Werrmann* v. *Perkins*, 79 F. 2d 467, 469. Here the Government never bore any burden of showing that petitioner was deportable as having been, since his entry, a Communist. The determination of his deportability was made on entirely different grounds; that (as was conceded) he had failed to maintain the student status on the basis of which he had been admitted to the United States. At the hearing on suspension of deportation the Government introduced literally no evidence even remotely suggesting that petitioner had ever been a Communist; and much evidence as to petitioner's good character was introduced. But, appar-

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as it stood as of the time of the administrative hearing and review in 1951 and early 1952, before the passage of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. §1101 *et seq.*, on June 27, 1952. See § 405 (a) of the later Act, 66 Stat. 280.

[2] Section 23 of the 1924 Immigration Act, 43 Stat. 165, placed the burden on the alien in a deportation proceeding to show that he had been lawfully admitted to the country. The current Act is to the same effect. § 291, 66 Stat. 234, 8 U. S. C. § 1361. The courts in the cases cited in text drew a sharp distinction between this issue and the matter of deportability owing to post-admission conduct. The failure of Congress to specify other issues on which the alien has the burden is confirmation of the correctness of these decisions. See *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 153.

ently at random, and out of the blue, petitioner was asked about membership in the Communist Party; and he declined to answer, citing his constitutional privilege against self-incrimination. On this basis the administrative officials found that he was ineligible for suspension of deportation.

If the basis on which it was sought to deport petitioner in the first place was that he was deportable as a Communist or ex-Communist under §§ 1 and 4 of the 1918 Act, as amended, it could hardly be contended that this would be evidence, let alone sufficient evidence, that he was or had been a Communist, on which to base a finding of deportability. Cf. *Slochower* v. *Board of Higher Education*, 350 U. S. 551. The provision in § 19 of the 1917 Immigration Act, as amended, which is relied on, disqualifies from suspension an alien who is "deportable" under the other Act; and one would think the burden of proof of deportability in both circumstances should be the same. The most obvious case, of course, for the application of § 19's disqualification from suspension is the one in which the Government, in the deportation proceedings, has already borne the burden of proving the alien deportable under the amended 1918 Act. It is an anomaly that the burden of proof shifts, there ceases to be a requirement of evidence of deportability as a Communist or ex-Communist, and the alien must prove a negative in order to qualify for suspension, when the Government has chosen to base deportation on some other ground. In support of this the Court cites only a regulation which stated in general terms that it was up to the alien to show his eligibility for suspension. 8 CFR § 151.3 (e) (1949 ed.), as added, 15 Fed. Reg. 7638.

I would think it perfectly plain that such a regulation, as applied in this case, would be contrary to the statutory

scheme, properly and responsibly construed.[3] In the first place, as I have noted, it turns around the ordinary rules as to the burden of proof as to which party shall show "deportability." It requires the alien to prove a negative—that he never was a Communist since he entered the country—when no one has said or intimated that he was. Such proof would necessarily lead to petitioner's bearing the laboring oar in showing that all his political or economic expressions in this country were independent of any covert connection with the Communist Party. The effect of imposing such a burden of exculpation on the exercise, for example, of non-Communist political action on behalf of causes which Communists might also happen to favor is obvious. In fact, on this very basis, we not so long ago struck down a state statute which placed on an individual desiring a tax exemption the burden of proof to show that his political activities were not of a proscribed nature—of a nature, moreover, which we assumed the State had the power directly to proscribe. *Speiser* v. *Randall*, 357 U. S. 513, 520. We have this Term reaffirmed the central principle of that case, its inhibition on procedural devices which, though designed to reach legitimate ends, impose burdens on the exercise of the freedom of speech, in a subsequent decision, by striking down another state enactment. *Smith* v. *California*, 361 U. S. 147. On such a basis we declared the enactments of sovereign States unconstitutional; I think we should hardly be less willing to apply the same doctrine to set aside as not statutorily warranted, a federal administrative regulation which anomalously turns about the ordinary state of the burden

[3] Section 19 (c) in terms imposes a burden of proof on the alien as to his good moral character, but is silent as to the burden of proof otherwise. And it is in § 19 (d) that the noneligibility of those deportable under the amended 1918 Act is provided for; and § 19 (d) is inexplicit as to the burden of proof. Accordingly, no support for this application of the regulation can be found in § 19 (c).

of proof as to "deportability," and in fact so far dispenses with the ordinary requirement of evidence of "deportability" that the alien must shoulder the burden of negating it even where the Government has introduced no evidence at all on the issue.

We are, apart from construction of the Constitution, responsible for the proper construction of Acts of Congress, and for determining the validity of challenged administrative regulations and procedures under them. Here we are called upon only to put a rational construction upon a federal statute and the allocation of the burden of proof under it, that will promote the statute's internal consistency and minimize its frictions with the First Amendment. One of the relevant enactments, § 22 of the 1950 Internal Security Act, is a harsh one whose constitutionality was upheld here only on historical grounds. See *Galvan* v. *Press*, 347 U. S. 522, 530–532. By subscribing to the anomalous allocation of the burden of proof here, we increase the statute's harshness, promote the procedural restriction on the freedom of speech which we condemned in *Speiser* and *Smith*, and in practical effect, because of the allocation, let this petitioner's invocation of his constitutional privilege be equated with a demonstration of his deportability as to the matters on which he invoked the privilege. I cannot subscribe to a construction that has this effect, and accordingly dissent.